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No. 99-1637

IN THE

Supreme Court of the United States

RAFFENSPERGER, HUGHES & CO., INC., *et al.*,

Petitioners,

v.

VIRGINIA E. BROUWER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In formulating the "question presented" by their Petition, Petitioners claim that there is a "class of persons excluded from Section 1962(c) liability under *Reves*." (Petition, p.i.)[1] That supposedly being the case, Petitioners argue, that same "class of persons" should not be subject to liability for conspiracy under § 1962(d), the *Salinas* case notwithstanding.[2] Among other things, however, Petitioners' initial premise is wrong. Despite Petitioners' claims to the contrary, anyone from any "class of persons" can be liable under § 1962(c), provided he or she participates in the operation or management of the enterprise through a pattern of racketeering. This includes outside service providers. As recognized in *Reves*, such outside service providers (the relevant "class of persons") can be liable under § 1962(c) whenever they participate in the management or control of the enterprise. Similarly, any member of any class of persons can be liable as a member of a § 1962(d) conspiracy to violate § 1962(c), provided that he or she agrees to facilitate that violation.

Accordingly, the "question presented" can be better stated as follows:

> May a person be held liable under § 1962(d) of RICO for conspiring to violate § 1962(c) even though he or she has not agreed to participate personally in operating or managing the affairs of the corrupt enterprise but has nonetheless knowingly facilitated the commission of the § 1962(c) violation?

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1. *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

2. *Salinas v. United States*, 522 U.S. 52 (1997).

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Introduction	1
Counterstatement of the Case	3
Reasons for Denying the Writ	6
I. There Is No Current Conflict Among The Circuits	6
A. Any Disagreement Was Before *Salinas*	6
B. After *Salinas* The Only Courts To Consider The Issue Are In Accord	8
II. The Seventh Circuit's Holding Does Not Conflict With Any Decisions Of This Court	9
A. *Reves* Does Not Apply To This Case	9
B. The Seventh Circuit Followed *Salinas*	11

Contents

Page

C. The Seventh Circuit's Decision Does Not Broaden The Purported Class Of Persons Subject To Liability Under Section 1962(c) 15

1. There is no special class of persons subject to § 1962(c) liability. 15

2. The antitrust laws do not support Petitioners' position. 17

III. Several Of Petitioners' Arguments Were Never Raised Or Considered In The Courts Below 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 17

Brown v. Donco Enters., Inc., 783 F.2d 644 (6th Cir. 1986) 18

Fortney v. Kuipers, 1999 WL 102772 (N.D. Ill. 1999) 11

MCM Partners, Inc. v. Andrews-Bartlett & Assoc., 62 F.3d 967 (7th Cir. 1995) 2, 7, 10

Napoli v. United States, 45 F.3d 680 (2d Cir. 1995) . 7, 9

Neibel v. Trans World Assurance Co., 108 F.3d 1123 (9th Cir. 1997) 7

Pinkerton v. United States, 310 U.S. 150 (1940) .. 13

Reves v. Ernst & Young, 507 U.S. 170 (1993) ... *passim*

Salinas v. United States, 522 U.S. 52 (1997) .... *passim*

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 17, 18

Cited Authorities

Page

Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n, 358 F.2d 115 (9th Cir. 1966) 18

United States v. Antar, 53 F.3d 568 (3d Cir. 1995) .. 7

United States v. Bailey, 734 F.2d 296 (7th Cir.), *cert. denied*, 469 U.S. 931 (1984) 16

United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998), *cert. denied*, 526 U.S. 1031 (1999) 2, 8, 10

United States v. Quintanilla, 2 F.3d 1469 (7th Cir. 1993) 8

United States v. Rabinowich, 238 U.S. 78 (1915) ... 10, 13

United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940) 12, 13

United States v. Starrett, 55 F.3d 1525 (11th Cir. 1995) 7, 9

Webster v. Omnitrition Int'l, Inc., 79 F.3d 776 (9th Cir. 1996) 7

Cited Authorities

Page

Statutes:

Clayton Act, 15 U.S.C. § 15 17

RICO, 18 U.S.C. § 1962(c) ..... *passim*

RICO, 18 U.S.C. § 1962(d) ..... *passim*

RICO, 18 U.S.C. § 1964(c) 17

Other Authorities:

Model Penal Code, § 5.03(1) 15

Model Penal Code, § 5.03(1)(a) 14

Respondents Virginia E. Brouwer, *et al.*, respectfully request this Court to deny the Petition of Raffensperger, Hughes, and Company, Inc. ("Raffensperger") and Barnes & Thornburg and Catherine L. Bridge (together, "B&T") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

In this case, the United States Court of Appeals for the Seventh Circuit held that, to be liable under RICO § 1962(d) for conspiring to violate § 1962(c), a person must agree "to knowingly facilitate the activities of the operators or managers" of a corrupt enterprise. (Appendix to Petition for Writ of Certiorari ("App.") 12a.) The Seventh Circuit based its holding squarely on this Court's opinion in *Salinas*. *Salinas*, of course, applied well-settled principles of general conspiracy law in rejecting a defendant's argument that, for § 1962(d) liability, a defendant must agree to personally commit two predicate acts. Rather, this Court upheld the conspiracy conviction of a defendant under § 1962(d) who did not agree to personally commit two predicate acts. Indeed, that defendant had even been acquitted of the substantive crime under § 1962(c). In upholding his conspiracy conviction, this Court found "ample evidence" that the defendant had conspired in the § 1962(c) violation, in that he knew about and agreed to facilitate the scheme of another. 522 U.S. at 66.

Here, relying on the reasoning of *Salinas,* the Seventh Circuit held that a § 1962(d) violation does not require an agreement by the conspirator to personally operate or manage the enterprise. Rather, all that is required is a knowing agreement to perform services of a kind which facilitate the

activities of those who are operating the enterprise in an illegal manner. The court therefore reversed the judgment of the district court, which had wrongly held that, to be in violation of subsection (d), one must *agree to personally participate in* the operation or management of the enterprise. In so holding, the Seventh Circuit was consistent with a number of its earlier cases with similar rulings.[3]

Contrary to Petitioners' arguments, this Court's opinion in *Salinas* neither created nor increased any alleged confusion about the extent to which so-called "outsiders" may be liable for conspiring to violate § 1962(c). Indeed, the only two Circuit Courts to address the issue since *Salinas* are in accord: one need not agree personally to operate or manage the enterprise for § 1962(d) liability.[4] Even before *Salinas*, several other courts had already reached the same conclusion. (*See infra,* n.8, 10.) Only two Circuit Courts have held the opposite, and they did so before *Salinas.* (*See infra,* n.6, 7.) Neither, therefore, has had the opportunity to review its position in light of that decision.

As a result, there is no reason for this Court to review this case. The Circuits are simply not in conflict on the effect of *Salinas*. Nor is there any conflict or inconsistency between the decisions of this Court and the opinion of the Seventh Circuit. Finally, several of the arguments advanced in the Petition were never raised or considered in the courts below and thus are not ripe for consideration now. Accordingly, the Petition should be denied.

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3. *See, e.g., MCM Partners, Inc. v. Andrews-Bartlett & Assoc.,* 62 F.3d 967 (7th Cir. 1995); *United States v. Quintanilla,* 2 F.3d 1469 (7th Cir. 1993).

4. *Brouwer, et al., v. Raffensperger, Hughes & Co., et al.,* (App. 1a); *United States v. Posada-Rios,* 158 F.3d 832 (5th Cir. 1998), *cert. denied,* 526 U.S. 1031 (1999).

COUNTERSTATEMENT OF THE CASE

Respondents disagree with Petitioners' Statement of the Case because it is inaccurate and incomplete.[5] Respondents therefore submit the following.

This class action was brought on behalf of thousands of investors who held subordinated investment notes issued by Firstmark Corporation, an Indianapolis-based financial holding company. Firstmark filed for bankruptcy in 1988. The investors were the victims of a conspiracy of individuals and entities, including Petitioners, who sold them millions of dollars of worthless notes while systematically draining Firstmark, the issuer, of cash and other valuable assets.

Contrary to Petitioners' characterization of the facts, each of them played a pivotal role in the conspiracy. Petitioners' actions directly facilitated the fraudulent sale of the notes. None of them can be fairly characterized as only "peripherally involved."

The RICO conspiracy began in 1981, with a "going private" transaction whereby Firstmark became the wholly-owned subsidiary of Rockmont Corporation. This transaction created a crushing debt for Rockmont, which repaid itself through large cash dividends from Firstmark. In this way, by 1987, the conspiracy had stripped Firstmark of almost $8 million.

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5. Petitioners assert that the district court made certain factual findings which Respondents purportedly did not and presumably now cannot dispute. That is not true — but also not relevant to the petition. At this point it is sufficient that the Seventh Circuit merely accepted the facts favorable to the Respondents and as pled in the complaint. App. 2a, 16a.

Petitioners joined the conspiracy in 1985. At that time, the NASD amended its rules regarding the sale of securities by its members, requiring Firstmark to retain a Qualified Independent Underwriter ("QIU") to perform due diligence on its registration statement and to set a minimum yield for the notes. Raffensperger agreed to act as the QIU. Among other things, B&T agreed to assist in the due diligence review that was used to set the minimum yields. *Thus, without the participation of Petitioners, the notes could not have been sold.*

From their due diligence investigation, Raffensperger and B&T learned about the fraudulent note scheme, learned that Firstmark's assets were being siphoned off to Rockmont, learned that notes were being sold to investors solely to create cash flow to pay interest on old notes, and learned that there was virtually no chance that the notes could ever be repaid. Despite this knowledge, Petitioners agreed to hide the true facts and to assist in the fraudulent sale of notes.

As QIU, Raffensperger had absolute control over the notes' minimum yields. It used that power to further the conspiracy and its goals by intentionally setting the yields deceptively low. The low yields made the notes appear less risky when compared to yields offered on other, similar securities. Moreover, because of the due diligence investigation performed by B&T on behalf of Raffensperger, both were aware that the yields bore no relationship to the actual return that an investor was likely to obtain or the inherent risk of the notes. Instead, the yields were expressly calculated to hide the notes' substantial risk.

As for B&T, from 1985 until Firstmark's bankruptcy in 1988, B&T was far more that a "mere provider" of "legal services." Indeed, B&T filled at least three crucial roles that allowed the conspiracy to pursue its goal of draining the assets of Firstmark. As with Raffensperger, without B&T the conspiracy could not have functioned in the manner it did, for as long as it did, or as successfully.

First, although B&T knew that Firstmark was financially incapable of repaying the notes, it assisted Raffensperger in setting the deceptive minimum yields. Second, B&T helped conceal the conspiracy and its fraud, by concealing vital information from the public. For example, in September 1987, B&T ensured that the Indiana Securities Commission would not take any public or private action against Firstmark, so that investors would remain ignorant of Firstmark's precarious financial condition and the high risk of their notes.

Finally, once the conspiracy could no longer finance its operations through the fraudulent note sales, B&T facilitated the sale of Firstmark to another of B&T's clients, Capitol Securities. In so doing, B&T assisted in the fraudulent transfer of another $10 million of Firstmark's assets. As a result, Firstmark was left little more than a shell and the investors, most of whom were elderly and living on fixed incomes, were out $57 million.

Throughout, Petitioners knew what they were doing and the likely result. Petitioners each had complete access to Firstmark's financial records and all details relating to the sale of the notes. Petitioners therefore had full knowledge of Firstmark's dire and deteriorating financial condition, the fraudulent nature of the note sales, and the draining of Firstmark's assets. Because they had access to Firstmark's

records, Petitioners knew that the note sales they were facilitating created the appearance of solvency for Firstmark. Petitioners knew that the co-conspirators used this false appearance of solvency to move millions of dollars of assets out of Firstmark. Petitioners also knew that, at the time they were facilitating the note sales, there was virtually no chance that investors could ever recoup their investments.

Accordingly, although neither Raffensperger nor B&T directly operated or managed the enterprise, they were far more than innocent outside service providers. Instead, each of them had an important and necessary role in the conspiracy and in accomplishing its goals. Under well-settled conspiracy law, even apart from RICO, each of them could be liable for the violations of their co-conspirators. A similar result under RICO, as found by the Seventh Circuit, is not a "new rule" of law. Nor is it unfair.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CURRENT CONFLICT AMONG THE CIRCUITS

A. Any Disagreement Was Before *Salinas*

Petitioners urge this Court to grant a writ of certiorari because, they claim, the Circuits are split on the question presented. According to Petitioners, the law of certain Circuits differs with respect to application of the *Reves* "operation or management" test to RICO conspiracy claims. They argue that the holdings of the Third and Ninth Circuits are in direct conflict with those of the Second, Fifth, Seventh

and Eleventh Circuits on whether liability can be imposed on "outsiders who have not agreed to direct the affairs of the enterprise." (Petition, p. 11.) This purported conflict, Petitioners assert, has been "festering for years," requiring review by this Court to "get all the Circuits in line." (Petition, pp. 11-12.)

Before *Salinas,* certainly, it would have been fair to argue that a split in the Circuits existed on the question. The Third Circuit[6] and the Ninth Circuit[7] had both held that a defendant could not be liable for conspiracy to violate § 1962(c) unless she or he agreed to take some personal part in directing the RICO enterprise. These courts had reasoned that liability should not attach for conspiracy to do something for which a person could not be directly liable under the substantive clause of the statute.

In contrast, even before *Salinas,* the Second,[8] Seventh[9] and Eleventh Circuits[10] had come to the opposite conclusion: a defendant could be liable for conspiracy to violate § 1962(c) as long as some member of the conspiracy agreed to direct the affairs of the enterprise through a pattern of racketeering.

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6. *United States v. Antar,* 53 F.3d 568 (3d Cir. 1995).

7. *Neibel v. Trans World Assurance Co.,* 108 F.3d 1123 (9th Cir. 1997), and *Webster v. Omnitrition Int'l, Inc.,* 79 F.3d 776 (9th Cir. 1996).

8. *Napoli v. United States,* 45 F.3d 680 (2d Cir. 1995).

9. *MCM Partners v. Andrews-Bartlett & Assoc.,* 62 F.3d 967 (7th Cir, 1995).

10. *United States v. Starrett,* 55 F.3d 1525 (11th Cir. 1995).

These courts concluded, based both on this Court's interpretation of the statute and on general conspiracy principles, that a RICO conspiracy does not require proof that all of the alleged co-conspirators conducted or participated in the conduct of the affairs of the enterprise to the extent mandated by *Reves*. According to these courts, such a requirement would entail a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a prescribed objective is sufficient.[11]

B. After *Salinas* The Only Courts To Consider The Issue Are In Accord

Since this Court's decision in *Salinas*, only two Circuits have had the opportunity to consider what must be alleged and proved to establish § 1962(d) liability for conspiring to violate § 1962(c). Those two courts, the Fifth Circuit[12] and the Seventh Circuit in this case, agree that, based on the reasoning in *Salinas*, a defendant can be liable for conspiring to violate § 1962(c) even if he or she did not *personally* agree to operate or manage the corrupt enterprise. Indeed, the Fifth Circuit directly considered the split that had existed before *Salinas* and determined that, in light of that decision, the Third and Ninth Circuits' position was no longer tenable. 158 F.3d at 857.

Accordingly, the actual question presented by this Petition is whether *Reves* or *Salinas* controls liability under § 1962(d). As to this, there is no split in the Circuits. Only

11. *See, e.g., United States v. Quintanilla*, 2 F.3d 1469, 1484-85 (7th Cir. 1993).

12. *United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998).

two circuits have considered it and both agree. Both say *Salinas* controls. Thus, there is no reason for this Court to take up the matter now, certainly not before the Third and Ninth Circuits have an opportunity to reexamine the issue in light of *Salinas*. Indeed, because of the clear directive in that case that general conspiracy principles apply to RICO conspiracies, it is very likely that those courts will follow the Fifth and the Seventh Circuits and hold that *Salinas* controls. Even if they do not, until they have the issue presented to them for decision, it would be premature for this Court to consider it. Certainly, a split of authority cannot be created by mere speculation that the Third and Ninth Circuits will disregard the reasoning of *Salinas* and reiterate their prior, erroneous rulings.

II.

THE SEVENTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT

A. *Reves* Does Not Apply To This Case

With the exception of the Third and Ninth Circuits, as noted above, every Circuit Court that has reviewed this issue has held, like the Seventh Circuit here, that ordinary conspiracy principles apply to RICO conspiracies. Thus, a clear majority believe that liability can be imposed on a RICO conspirator even if that person did not personally agree to operate or manage the RICO enterprise. *Napoli,* 45 F.3d at 683 (petitioners guilty because they provided substantial assistance to those who actually conducted the affairs of the nefarious enterprise); *Starrett*, 55 F.3d at 1547 (defendant guilty who manifested agreement to participate in corrupt enterprise; *Reves* test does not apply to RICO conspiracy);

MCM Partners, 62 F.3d at 979 (a defendant may conspire to violate section 1962(c) even if that defendant could not be characterized as an operator or manager of a RICO enterprise under *Reves*); *Posada-Rios*, 158 F.3d at 858 (defendant may be convicted of RICO conspiracy even if he only participated at one level of the conspiracy and only played a minor role).

Petitioners argue, however, that the Seventh Circuit's opinion "excessively extend[s] *Salinas* and essentially nullif[ies] *Reves*." (Petition, p. 13.) This argument is unconvincing, however, in the face of comments in *Salinas* that one can violate § 1962(d) even if he or she could not be guilty of the underlying substantive offense. 522 U.S. at 64, *citing United States v. Rabinowich*, 238 U.S. 78, 86 (1915). This is especially true since *Salinas* made it clear that the RICO conspiracy statute is actually broader than the general conspiracy statute. 522 U.S. at 63-64.

Petitioners also claim that the facts of *Reves* and those of this case are "closely parallel." (Petition, p. 13.) Even if true, that would not be relevant since *Reves* only dealt with § 1962(c) and not § 1962(d). As is often the case in a conspiracy, certain conduct that would not subject one to substantive liability could still result in liability as a conspirator. Moreover, the facts of *Reves* and *Salinas* are not that close. The acts of the auditors in *Reves* were not *essential* to the scheme, as were the acts of Petitioners here. Again, and most importantly, *Reves* simply had nothing to do with conspiracy principles — it dealt solely with whether an outside auditor, on the facts presented, could be held liable for a § 1962(c) violation, one of RICO's substantive offenses. Thus, there is nothing in *Reves* that addresses the issues in this case. Accordingly, Petitioners' lengthy analysis of *Reves* is irrelevant.

Ultimately, Petitioners' petition is based on a false dichotomy. Under Petitioners' view of the RICO world, there exist only polar opposites, with nothing in between. At one end is the "operator or manager" of the enterprise, who Petitioners concede can be liable under both subsections (c) and (d).[13] At the other extreme is the pure outside service provider who does not operate or control the enterprise. He or she, Petitioners assert, can never be liable under either section.

To Petitioners, if you do not control or manage the enterprise, and thus cannot be liable for the substantive § 1962(c) offense, then you cannot be liable under § 1962(d) as a conspirator for facilitating that offense. But nothing in either the language or the legislative history of RICO compels such a result.[14] Thus, there is nothing in the Seventh Circuit's holding that is at odds with settled law.

B. The Seventh Circuit Followed *Salinas*

Petitioners claim that the Seventh Circuit should have grafted the *Reves* "operation or management" test onto § 1962(d), and that its failure to do so is supposedly error. In essence, Petitioners believe that *Reves* controls instead of *Salinas,* even though *Reves* was earlier and did not address conspiracy liability, while *Salinas* specifically dealt with the

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13. Given the factual allegations, even if *Reves* did apply, at the very least Raffensperger would still be liable because it directly controlled the affairs of the enterprise by setting yields as QIU.

14. *See, e.g., Fortney v. Kuipers,* 1999 WL 102772 (N.D. Ill. 1999) (finding liable attorney who advised client how to conceal assets from judgment creditor under § 1962(d), even though he did not operate or manage the enterprise).

requirements for a conspiracy claim under RICO. Obviously, *Salinas* must control and it holds that a RICO conspiracy does not require a greater showing than does a conventional conspiracy. Indeed, in at least one respect, a RICO conspiracy requires less proof, because no overt act is required. 522 U.S. at 63.

As *Salinas* makes clear, RICO was intended to reach everyone who knowingly agrees to facilitate a RICO violation, not merely those who commit or agree to commit the elements of the substantive offense, such as the predicate acts or operating or managing an enterprise. As under traditional conspiracy law, a conspirator need only agree that some member of the conspiracy will commit the crime. Nothing in *Reves* is contrary, since it had nothing to do with conspiracy under § 1962(d). *Reves* did not even attempt to interpret that section or define to whom it could be applied. And, contrary to Petitioners' claim that "nothing in *Salinas* justifies using conspiracy law to expand the 'universe' of potential conspirators beyond the boundaries prescribed" by *Reves* (Petition, p. 21), the very reasoning underlying *Salinas* amply supports such use.

Salinas expressly stated that a RICO conspiracy is governed by the same general principles as any other conspiracy. The Seventh Circuit's holding here is fully consistent with those general conspiracy principles. Those principles were discussed at length in *Salinas*. Because "a conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense," it follows that a § 1962(c) conspirator need not agree personally to operate or manage the corrupt enterprise, which is one part of the substantive offense. 522 U.S. at 63, *citing United States v. Socony Vacuum Oil Co.,* 310 U.S.

150, 253-54 (1940). As long as everyone involved agrees to pursue the same criminal objective, they may divide up the work any way they see fit. Each will still be responsible for the acts of the others. 522 U.S. 64, *citing Pinkerton v. United States,* 310 U.S. 150 (1940).

A person may even be liable for conspiracy when he or she is "incapable of committing the substantive offense." 522 U.S. at 64, *citing United States v. Rabinowich,* 238 U.S. 78, 86 (1915). This principle is particularly applicable here. Thus, even if Petitioners could not be liable under § 1962(c) because they did not agree to operate or manage the corrupt enterprise, as they claim, they can still be liable for conspiring with others to do so.

Nor does the Model Penal Code support Petitioners' position. According to them, under the MPC, if one agrees to aid in the commission of an offense, he or she is guilty of conspiracy. If, however, the offense is completed, then that same person would be guilty of being an accomplice. Petitioners then make a logically unwarranted leap. They argue that one who cannot be an accomplice cannot be a conspirator. According to them, because an outsider supposedly cannot be liable for another person's operation or management of a RICO enterprise under an accomplice theory merely by facilitating the offense, then that outsider cannot be guilty of § 1962(d) conspiracy. (Petition, p. 24.)

The flaw in Petitioners' argument here is in equating an accomplice with a conspirator, distinguished only by whether the crime is completed. They are not the same. The universe of conspirators is broader than the universe of failed accomplices. As *Salinas* made clear, to be guilty of conspiracy, under either RICO or the MPC, all that is required is that one knowingly agree to facilitate the crime:

> When Congress passed RICO in 1970, . . . , the American Law Institute's Model Penal Code permitted a person to be convicted of conspiracy so long as he "agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime." [Citation omitted.] As the drafters emphasized, "so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree 'to commit' the crime."

522 U.S. at 64-65, *citing* Model Penal Code, § 5.03(1)(a) (1962).

As this Court also noted, for liability to attach, all one needs to do is to adopt a criminal goal:

> [a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.

522 U.S. at 65.

Again, Petitioners' position is that conspiracy and accomplice theory are virtually the same. They are wrong. Although a failed accomplice may be liable as a conspirator, not every conspirator is merely a failed accomplice. Conspiracy liability encompasses accomplice theory but goes

beyond it, to capture anyone who knowingly facilitates a crime:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Model Penal Code, § 5.03(1).

In the case before this Court, Petitioners knew about and agreed to facilitate Firstmark's fraudulent scheme. As *Salinas* makes clear, "this is sufficient to support a conviction under §1962(d)." 522 U.S. at 66.

C. The Seventh Circuit's Decision Does Not Broaden The Purported Class Of Persons Subject To Liability Under Section 1962(c)

1. There is no special class of persons subject to § 1962(c) liability.

Petitioners argue that the *Reves* operation or management test "defines the universe of people who may be conspirators." (Petition, p. 21, emphasis omitted.) Petitioners claim that the Seventh Circuit erred because it impermissibly broadened the purported "class of persons" subject to liability under § 1962(c). (Petition, p. 17.) Petitioners' argument,

however, is based on a false premise. There simply is no "class of persons" who are either necessarily subject to § 1962(c) liability or excluded from such liability. The potential for § 1962(c) liability depends not on status, as Petitioners assert, but on conduct. Unlike the crime of embezzlement, for example, where only persons who come into possession of the property of another by virtue of their employment can be guilty of the crime,[15] anyone can be liable under § 1962(c) if they engage in the prohibited conduct. Thus, under *Reves,* even an outside service provider can be liable under § 1962(c) if he or she manages or operates the enterprise. 507 U.S. at 184-85. It is not the person's status as an outside service provider that is relevant. It is that person's conduct.

Petitioners have little support for their "class of persons" argument. Initially, they point to legislative history, stating that it "contains no suggestion that Congress intended to undo through the conspiracy provision the categorical limitation it imposed on the class of persons who could be liable substantively under Section 1962(c)." (Petition, p. 17.) Since there is no such "categorical limitation" in the statute or elsewhere, however, the lack of discussion of the subject is not surprising. Nowhere in either RICO case law or its legislative history can Petitioners find any direct support for their proposition that, unlike under general conspiracy law, RICO conspiracy liability is limited to a special class of persons.

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15. *United States v. Bailey,* 734 F.2d 296 (7th Cir.), *cert. denied,* 469 U.S. 931 (1984).

2. The antitrust laws do not support Petitioners' position.

Petitioners assert that the antitrust laws also provide support for inferring that Congress intended to apply the *Reves* "operation or management" test to conspiracy claims, thereby limiting the class of persons subject to liability. (Petition, p. 18.) In support, they claim that RICO was modeled on the Clayton Act. Based on this assertion, they contend that general antitrust principles also apply to RICO cases. But Petitioners' basic assumption is simply wrong. While RICO § 1964(c), the section that provides for private civil remedies, including treble damages, was modeled on the Clayton Act,[16] Congress did not model the entire RICO statute on either the Clayton Act or any other antitrust law. None of Petitioners' cases say otherwise.[17] Accordingly, there is no basis for wholesale importation of antitrust principles into RICO cases.

To the contrary, there is direct authority suggesting that one must exercise caution in applying general antitrust theories to RICO cases. This Court has rejected the idea of a "racketeering injury" requirement for civil RICO.[18] In so doing, it reversed the Second Circuit, which had imported the racketeering injury idea from antitrust standing

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16. 15 U.S.C. § 15; *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987).

17. In footnote 6 of their Petition, Petitioners imply that, based on the Clayton Act, this Court rejected the requirement of a prior criminal conviction for civil liability under RICO. This suggestion is disingenuous at best; the cited case (*Sedima*) does not support it.

18 . *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

principles. The Court noted that "in borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid" by enacting a broad civil RICO remedy. 473 U.S. at 498-99.

Perhaps most importantly, conspiracy under the antitrust laws is different from a § 1962(d) conspiracy. Under RICO, of course, conspiracy is contained in a separate subsection making it a violation to conspire to commit any of several other offenses. In contrast, under the Sherman Act, conspiracy (to restrain trade) *is* an offense. Accordingly, the antitrust laws are irrelevant to the proper interpretation of § 1962(d).

With respect to the asserted limited class of persons, moreover, the cases cited by Petitioners[19] do not support them. In *Brown,* for example, the court merely held that an attorney acting solely on behalf of his client could not be individually liable under the antitrust laws unless he himself intentionally furthered anticompetitive goals. In so doing, the court noted, "if the attorney goes beyond the role of pure legal advisor, however, and acting by himself or jointly with others makes policy decisions for the corporation, he subjects himself to liability. . . ." 783 F.2d at 646-47. The court did not say, however, that making policy decisions for the corporation was the only way an attorney could be liable under the antitrust laws. That was just one way an attorney could intentionally further the anticompetitive goals of a client. There are certainly others. Again, it is conduct, not status, that is determinative.

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19 . *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n,* 358 F.2d 115, 118 (9th Cir. 1966); *Brown v. Donco Enters., Inc.,* 783 F.2d 644 (6th Cir. 1986).

III.

SEVERAL OF PETITIONERS' ARGUMENTS WERE NEVER RAISED OR CONSIDERED IN THE COURTS BELOW

Petitioners' arguments concerning the antitrust laws and the Model Penal Code were neither raised nor considered by the courts below. Accordingly, these arguments demonstrate that the issues presented by this case are not ripe for this Court's review. Until all of the applicable arguments have been fully addressed by the Circuit Courts of Appeals in light of this Court's decision in *Salinas,* certiorari is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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